

**SUPREME COURT  
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

DAVID CASSIRER, ET AL., )  
                                 Petitioners, )  
                                 v. ) No. 20-1566  
                                 THYSSEN-BORNEMISZA COLLECTION )  
                                 FOUNDATION, )  
                                 Respondent. )

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3   DAVID CASSIRER, ET AL.,                   )  
4                   Petitioners,                   )  
5                   v.                   ) No. 20-1566  
6   THYSSEN-BORNEMISZA COLLECTION                   )  
7   FOUNDATION,                   )  
8                   Respondent.                   )  
9   - - - - -  
10                   Washington, D.C.  
11                   Tuesday, January 18, 2022  
12  
13                   The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:25 a.m.  
16  
17   APPEARANCES:  
18   DAVID BOIES, ESQUIRE, Armonk, New York; on behalf of  
19   the Petitioners.  
20   MASHA G. HANSFORD, Assistant to the Solicitor General,  
21   Department of Justice, Washington, D.C.; for the  
22   United States, as amicus curiae, supporting the  
23   Petitioners.  
24   THADDEUS J. STAUBER, ESQUIRE, Los Angeles, California;  
25   on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:25 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 20-1566, Cassirer versus  
5 Thyssen-Bornemisza.

6 Mr. Boies, I understand you're  
7 participating remotely.

8 MR. BOIES: I am, Your Honor.

9 CHIEF JUSTICE ROBERTS: You may  
10 proceed.

11 ORAL ARGUMENT OF DAVID BOIES

12 ON BEHALF OF THE PETITIONERS

13 MR. BOIES: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 I begin with three simple  
16 propositions. First, Respondent is a foreign  
17 state not entitled to immunity under  
18 Section 1605 of the FSIA.

19 Second, section 1606 of that Act  
20 provides that as to any claim for relief, such  
21 a foreign state shall be liable in the same  
22 manner and to the same extent as a private  
23 individual under like circumstances.

24 Third, if the Respondent were a  
25 private museum and every other circumstance

1     were exactly the same, California choice-of-law  
2     rules would apply.

3             It necessarily follows from these  
4     three propositions, none of which is disputed,  
5     that California choice-of-law rules must apply  
6     to the Respondent. Any other rule would permit  
7     courts to apply different choice-of-law rules  
8     and thereby different substantive rules to  
9     foreign states than would be applied to private  
10    parties, resulting in the Respondent not being  
11    liable in the same manner and to the same  
12    extent as a private museum under like  
13    circumstances.

14            As discussed in our brief, even in the  
15    absence of such a clear direction from  
16    Congress, this Court should not interpret the  
17    FSIA as intending federal common law  
18    law-making. And 20 years of experience with  
19    four circuits interpreting section 1606 as  
20    written and applying state choice-of-law rules  
21    strongly suggest that Respondent's speculation  
22    about problems that might arise is unfounded.

23            But what is dispositive is that in the  
24    FSIA, Congress struck a comprehensive balance  
25    as to how claims against foreign states should

1 be adjudicated. Even if possible problems with  
2 that balance were to exist, it would be for  
3 Congress to address them.

4 I am pleased to respond to any  
5 questions the Court may have.

6 JUSTICE THOMAS: Mr. Boies, if we  
7 think that the district court and the court of  
8 appeals did, in fact, apply Spanish law, would  
9 have applied Spanish law in the exact same way  
10 to a private person, wouldn't you lose?

11 MR. BOIES: If the --

12 JUSTICE THOMAS: I mean, these --

13 MR. BOIES: If my third -- if my third  
14 proposition were wrong, that is, if the  
15 Respondent being a private museum would have  
16 had federal common law applied to it, then I  
17 think the Court is right. That is, if the FSIA  
18 intended that state law be displaced even for  
19 private parties and that that were the  
20 structure of the FSIA, then it would be applied  
21 to both the museum as well as the private  
22 museum. I would agree with that, Your Honor.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: There are  
25 certainly situations where a foreign

1 sovereign -- the -- the analogy that you're  
2 supposed to be treated like a private citizen,  
3 you know, absolutely makes no sense. I mean,  
4 what if the issue is something to do with how  
5 you're managing your army? How are you treated  
6 like a private citizen in a situation like  
7 that? Whether or not you've properly denied  
8 asylum to somebody, how are you treated like a  
9 private citizen there?

10 It -- it strikes me that your -- your  
11 -- your case pushes that principle pretty far,  
12 and I'm not sure it is -- it makes that much  
13 sense across the board.

14 MR. BOIES: Well, Your Honor,  
15 questions of how -- how the state is managing  
16 its army or asylum would not come up in an FSIA  
17 action.

18 CHIEF JUSTICE ROBERTS: Well, that  
19 seems to me to be --

20 MR. BOIES: The FSIA --

21 CHIEF JUSTICE ROBERTS: -- that --  
22 that seems to me to be avoiding the -- the  
23 question a little bit. I'm sure you can  
24 imagine better than I can cases that would come  
25 up in that context that might not be a

1 situation that could be replicated by a private  
2 citizen.

3 MR. BOIES: Your -- Your Honor, I --  
4 I'm not sure I agree with that because you have  
5 to have commercial activity to start with. And  
6 so --

7 CHIEF JUSTICE ROBERTS: All right.  
8 Well, then what if a -- what if a private  
9 citizen, you know, expropriated property the  
10 way that a sovereign could but a way a private  
11 citizen can't? I mean -- I mean --

12 MR. BOIES: Well --

13 CHIEF JUSTICE ROBERTS: -- if the --  
14 if the foreign -- if the foreign sovereign  
15 engaged in that activity, there would be no  
16 private citizen analogue.

17 MR. BOIES: The -- the private citizen  
18 analogue here under state law is conversion.  
19 And the -- the question is whether the private  
20 party or the foreign state is holding property  
21 improperly. There is an expropriation issue  
22 that was settled below which held that this was  
23 expropriation in violation of international  
24 law.

25 Once you have a violation, then the



1 FSIA kicks in, but it only kicks in with  
2 respect to commercial activities. It doesn't  
3 kick in with respect to the army or the asylum  
4 or anything else.

5 So you're only treating the foreign  
6 state as being liable in the same manner to the  
7 same extent under like circumstances where the  
8 foreign state is acting like a private  
9 individual, i.e., engaged in commercial  
10 activity.

11 JUSTICE SOTOMAYOR: Mr. Boies, I have  
12 two questions, one related to Justice Thomas's  
13 point. I believe the district court said that  
14 both California law and federal common law  
15 would adopt Spanish law. Why is it that we're  
16 here if you lose under both?

17 MR. BOIES: Because the Ninth Circuit  
18 did not reach that issue of -- of California  
19 law, which we think was erroneous. We did  
20 appeal that finding, but because of the way the  
21 Ninth Circuit decided the issue of federal  
22 common law, it never reached that issue.

23 JUSTICE SOTOMAYOR: That's what I  
24 understood.

25 With respect to Justice Roberts'

1 question -- and I'll ask the Solicitor General  
2 this -- it -- it seemed to have accepted the  
3 Chief's presumption that there were some  
4 international acts that would give rise to  
5 federal questions.

6 And -- and I think the U.S. is  
7 suggesting that the way to address those issues  
8 is not to change this rule about conflicts of  
9 law but to address those problems with other --  
10 with other doctrines, like the act-of-state  
11 doctrine, correct? Do you have a --

12 MR. BOIES: I --

13 JUSTICE SOTOMAYOR: -- different  
14 position than they do on that issue?

15 MR. BOIES: I -- I don't think I have  
16 a different position. I think I have a  
17 somewhat elaborated position.

18 With respect to the FSIA, the FSIA  
19 carves out certain provisions, for example,  
20 like punitive damages, that are going to be  
21 special for state actors, for foreign states.

22 Our position is that, here, where the  
23 statute has not carved out those kind of  
24 exceptions, if you're dealing with commercial  
25 activity, state law ought -- ought to apply.

1           We don't think that there will be  
2       situations in which there would be a special  
3       rule for the foreign state than for the private  
4       actors.

5           There might be situations in which,  
6       under act of state or comity or any of a  
7       variety of other provisions, the Court might  
8       limit what a private party could get just as it  
9       might limit what a state party could get based  
10      on considerations of comity and international  
11      law and the like.

12           But I think the command of  
13      section 1606 is that whatever rules are going  
14      to be applied to a private party should be  
15      applied to the foreign state when it's acting  
16      in its commercial activities.

17           JUSTICE SOTOMAYOR: Thank you,  
18      counsel.

19           JUSTICE ALITO: What would happen if  
20      the choice-of-law rule of a jurisdiction took  
21      into account the fact that the defendant is an  
22      instrumentality of a foreign state, as I think  
23      some choice-of-law regimes do?

24           What would -- what would happen under  
25      1606 in that situation? 1606 says that the

1 foreign state shall be liable in the same  
2 manner and to the same extent as a private  
3 individual under the circumstances.

4 Does that mean that -- that that  
5 jurisdiction's choice-of-law rule would be  
6 partially abrogated by 1606?

7 MR. BOIES: That, of course, is not  
8 this case, but I think that 1606 language would  
9 suggest that the state could not have a rule  
10 that discriminated against the foreign state.

11 So I think that to the extent that the  
12 state tried to have a rule that would  
13 discriminate against a foreign state, the 1606  
14 would preclude that.

15 JUSTICE ALITO: Well, this would  
16 actually be something that works in favor of  
17 the foreign state or at least it could be. But  
18 doesn't that difficulty suggest that 1606  
19 really should not come into the picture until  
20 after the choice-of-law decision has been made?

21 MR. BOIES: I don't think so -- I  
22 don't think so, Your Honor, because, if it --  
23 if it comes into effect only after the decision  
24 is made, you cannot have the state being held  
25 to the same manner and extent of liability.

1           You would have a separate choice of  
2     law that would be created that would direct to  
3     perhaps a separate rule of decision. And that  
4     would mean that the state would not be subject  
5     to the same liability to the same extent under  
6     exactly the same circumstances.

7           So I don't think that could be  
8     consistent with -- with section 1606.

9           JUSTICE ALITO: Well, there's another  
10    statutory provision that could lead to a  
11    victory on your part, and you do mention it,  
12    the Rules of Decision Act, but you downplay it.

13          MR. BOIES: Yes.

14          JUSTICE ALITO: And you highlight  
15    1606. Why do you do that?

16          MR. BOIES: Just because we -- we do  
17    emphasize the Rule of Decision, and I -- I  
18    don't mean to downplay it, Your Honor. But we  
19    concentrate on 1606 because it is such, in our  
20    view, a clear statutory command of Congress and  
21    one that they thought a lot about.

22          The FSIA was -- was a decade in its  
23    making, and it was a comprehensive, as this  
24    Court has said on a number of occasions,  
25    resolution of issues. And the balance that

1     they struck, which was a balance between the  
2     litigant against the state and the rights of  
3     the foreign state, is something that -- where  
4     it was as clear as we think it is in 1606, that  
5     that was the right thing to emphasize.

6             But we do -- we do rely on the Rules  
7     of Decision and -- and -- and, in addition, on  
8     the fact that when Congress enacted the FSIA,  
9     it did so in light of background principles of  
10    federalism, background principles of the strong  
11    presumption against creating federal common  
12    law, the context of the Richards case, where  
13    this Court relied on the same language in the  
14    Federal Tort Claims Act as was later used in  
15    the FSIA to reject an attempt to avoid state  
16    choice-of-law rules, even where there was, I  
17    would suggest, in the Richards case, a more  
18    plausible basis to do so than exists here.

19            So we -- we think that when the  
20    Congress enacted the FSIA against all of those  
21    backgrounds, even in the absence of such a  
22    clear congressional command as exists in 1606,  
23    the right interpretation of the FSIA would be  
24    that it did not indicate an intent to deviate  
25    from the use of state law and state

1 choice-of-law issues.

2 And, certainly, this case -- this --  
3 this Court has never interpreted a -- a statute  
4 from Congress as silently intended to separate  
5 state substantive rules from state  
6 choice-of-law rules.

7 JUSTICE KAGAN: Mr. Boies, some  
8 significant part of your argument seems to rely  
9 on a view that there's federal common law on  
10 one side but only on one side, and I'm  
11 wondering whether that's right.

12 Isn't there federal common law on both  
13 sides here? You know, the Klaxon rule, which  
14 says look to state choice-of-law rules, that is  
15 itself a rule of federal common law, isn't it?

16 MR. BOIES: I would have -- I would  
17 have said Klaxon was -- was a decision to hold  
18 that the federal courts were compelled on  
19 grounds of federalism to apply state  
20 choice-of-law provisions.

21 I don't think that this is a situation  
22 where there's federal common law on -- on both  
23 -- on both sides.

24 JUSTICE KAGAN: Well, I guess what I'm  
25 suggesting is that Klaxon points to using state

1 choice-of-law rules, but, in doing so, it is  
2 itself an exercise of federal common law. That  
3 pointing to state common law rules is a federal  
4 common law rule.

5 MR. BOIES: I would -- I would put it  
6 differently with respect, Your Honor, that --  
7 that what Klaxon is holding is that the state  
8 choice-of-law rules apply.

9 Now that is a federal decision, but I  
10 don't think it is a federal decision based on  
11 federal common law. I think it is a -- a  
12 federal decision based on the fact that under  
13 Klaxon and under Erie, there is not a -- a  
14 federal common law that applies when the  
15 underlying action is a state cause of action.

16 JUSTICE BARRETT: Mr. Boies, is it  
17 based on the Rules of Decision Act? Klaxon, I  
18 mean.

19 MR. BOIES: I don't -- I don't -- I  
20 don't believe that Klaxon is primarily based on  
21 the Rules of Decision Act. I think it is  
22 predominantly based on the constitutional and  
23 federalism grounds that underlie the Erie case.

24 And I think that Klaxon, as I read it,  
25 was simply the recognition by the Court that



1     for the same reason that the federal courts  
2     were required to apply state rules of decision,  
3     they were required to apply state choice-of-law  
4     rules.

5             CHIEF JUSTICE ROBERTS:   Well, Mr.  
6     Boies, as I understand it, Klaxon has been  
7     subject to some criticism.  And why does it  
8     make sense, if there is a federal interest in a  
9     state case, as there may be when you get to  
10    what the -- after deciding the choice-of-law  
11    question, why does it make sense that the  
12    federal court is restricted in assessing the  
13    application of that principle to the merits and  
14    not on the question of choice of law?

15            MR. BOIES:  I -- I -- I think that the  
16    constraint on the federal court would be the  
17    same with respect to merits and choice of law,  
18    Your Honor.  I'm not -- I'm not suggesting that  
19    it would be different.

20            I -- I believe that the -- the  
21    constraint on the federal court is the same for  
22    both choice of law and the underlying rules of  
23    decision and that the -- and that this Court  
24    has been pretty consistent in not separating  
25    those two.

1           I think Klaxon should be read as the  
2   Court saying that just as Erie required an  
3   application of state rules of decision, it also  
4   required the adoption of state choice-of-law  
5   provisions.

6           CHIEF JUSTICE ROBERTS: Justice  
7   Thomas?

8           JUSTICE THOMAS: No, nothing further.

9           CHIEF JUSTICE ROBERTS: Justice  
10   Breyer?

11           JUSTICE BREYER: Just to see if I  
12   understand this. Your -- your client is suing  
13   for conversion the things under California law.  
14   So we imagine --

15           MR. BOIES: Yes.

16           JUSTICE BREYER: -- your client, Mr.  
17   Smith, and Mr. Smith is suing a private bank in  
18   Spain. And you'd say, well, what law would  
19   apply? And the answer would be, well, he'd be  
20   in a diversity -- he would have to bring a  
21   diversity action if he were in federal court in  
22   California. And they would apply -- first, we  
23   look to California's choice-of-law rules, and  
24   we're going to get into an argument about that.  
25   Would California, in fact, apply Spanish law or

1 would it apply California law? But the first  
2 thing we say is, what law would California  
3 apply?

4 On the other hand, if your client were  
5 suing basically under federal law, suppose it  
6 had something to do with a bank account or  
7 something, and then it's an arising-under case,  
8 so we imagine Mr. Smith suing the bank, and  
9 it's federal law because that's his basic  
10 claim, his underlying claim. And so then we  
11 would do what the Ninth Circuit did and say,  
12 well, it's a federal claim, he'd be in federal  
13 court, arising under, and we look to what the  
14 federal courts would apply, what's their  
15 choice-of-law doctrine.

16 Am I right or wrong?

17 MR. BOIES: I -- I think you're  
18 exactly right. Our -- our position is that the  
19 -- Mr. Smith's case against the private bank  
20 should come out the same way as our case  
21 against the state actor, recognizing that the  
22 state actor here is engaged in commercial  
23 activity.

24 CHIEF JUSTICE ROBERTS: Justice Alito?  
25 No?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: No. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Justice Gorsuch?

5 Justice Barrett?

6 Thank you, Mr. Boies.

7 MR. BOIES: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Hansford.

9 ORAL ARGUMENT OF MASHA G. HANSFORD

10 FOR THE UNITED STATES, AS AMICUS CURIAE,

11 SUPPORTING THE PETITIONERS

12 MS. HANSFORD: Mr. Chief Justice, and

13 may it please the Court:

14 Rather than creating an independent  
15 liability standard for FSIA cases, Congress  
16 directed that a foreign state should be liable  
17 in the same manner and to the same extent as a  
18 private individual under like circumstances.  
19 That language provides a clear answer to the  
20 question presented.

21 As Justice Breyer indicated in his  
22 last question, if every fact in this case were  
23 the same, but the foundation were a private art  
24 gallery, everyone agrees that a court would use  
25 state choice-of-law rules to select the rule of

1 decision for Petitioners' property claims.

2 Section 1606 requires the same treatment in a  
3 case against a foreign state.

4 And that result comports with first  
5 principles. Unless federal law provides  
6 otherwise or Congress directly specified, state  
7 choice-of-law rules normally apply.

8 But, here, first principles are just  
9 icing. The clear language of section 1606  
10 easily resolves this case.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: But you seem to  
13 suggest in your brief that if the interests of  
14 the foreign sovereign are not taken in -- taken  
15 -- if they're dismissed -- if we are -- if the  
16 -- that approach is too dismissive of those  
17 interests, we should look to other sources.

18 MS. HANSFORD: We don't think there's  
19 any problem across the board in applying state  
20 choice-of-law rules. I think, in a particular  
21 case, the -- once the law is selected, the  
22 application of a particular law could raise  
23 issues of such interest to foreign policy that  
24 that is a basis for creating federal common law  
25 on that particular issue, and the act-of-state

1 doctrine is the perfect example of that, what  
2 the Court did in Sabbatino. But we do not  
3 think that that applies across the board for  
4 choice-of-law rules.

5 And while Respondent in their brief  
6 suggests that using state choice-of-law rules  
7 somehow fails to give sufficient weight to  
8 foreign policy concerns, we just don't think  
9 that is correct. We think that in the 30 years  
10 that this has been the rule in the Second  
11 Circuit, we're not aware of any concerning  
12 decisions at the choice-of-law level.

13 And, in fact, of the leading  
14 decisions, the two decisions in the Second  
15 Circuit, Karaha Bodas and Barkanik, and the  
16 Oveissi decision in the D.C. Circuit actually  
17 used state choice-of-law rules to select  
18 foreign law. And, somewhat ironically, the  
19 leading case in the Ninth Circuit, the  
20 Schoenfeld decision, used federal choice-of-law  
21 rules to select California over Mexican law,  
22 and in that case, it was actually the foreign  
23 instrumentality that was arguing for state  
24 choice-of-law rules.

25 So I think the idea that there is

1 something inherently in tension with foreign  
2 policy concerns of using the normal framework  
3 is just not borne out in practice.

4 CHIEF JUSTICE ROBERTS: Well, that's  
5 -- I have to say it does surprise me for --  
6 that the representative of the federal  
7 government can't envision a situation where it  
8 may be contrary to their foreign policy to  
9 apply a particular state's choice of law.

10 Now I -- I understand that may be  
11 unusual, but you seem to think that the -- that  
12 the federal policy is always going to be to  
13 apply the foreign law and -- and, you know,  
14 citing those cases where they did, contrary to  
15 the -- their own state law, as examples about  
16 why this is consistent with the federal  
17 government.

18 But is it really just impossible to  
19 imagine a case where the state choice-of-law  
20 issue, not the substantive law, would itself be  
21 one that infringed upon federal policy to such  
22 an extent that you would want to apply a  
23 different choice-of-law rule?

24 MS. HANSFORD: No, Mr. Chief Justice,  
25 it is not impossible to imagine. And I -- I

1     can give you an example, but, before I do, I  
2     just want to note that that issue can arise at  
3     any stage. It can arise as to any merits rule.  
4     Once law is selected, the application of a  
5     particular law could infringe on foreign policy  
6     concerns. And we don't think, and I think  
7     nobody has suggested, that that is a reason to  
8     create substantive federal law of liability  
9     under the FSIA instead of using state rules.

10           So we think that if that situation  
11     were to arise, it hasn't so far, but if it were  
12     to arise, those normal principles would --  
13     would kick in and would take care of that. And  
14     so, to give you an example --

15           CHIEF JUSTICE ROBERTS: Even at the  
16     choice-of-law stage?

17           MS. HANSFORD: Yes, even at the  
18     choice-of-law stage. Our -- our basic  
19     submission is that choice of law is really no  
20     different than any other aspect of state law.  
21     And because Congress has made the judgment to  
22     defer to states' policy judgments in general,  
23     there's no reason to carve out choice-of-law  
24     principles from that. And I think that the  
25     reasoning of the Klaxon decision goes to that.



1           I think the most closely analogous  
2     context is really the Richards decision under  
3     the FTCA, and I think that is a way to avoid  
4     those difficult questions that -- that you were  
5     raising, Justice Kagan.

6           Instead of looking all the way to Erie  
7     and Klaxon, look at what the Court did in  
8     Richards. And, there, the Court said that the  
9     FTCA, because Congress has shown an interest in  
10    tying matters so closely to state policy  
11    judgments, we'd really need a pretty specific  
12    indication to think that choice of law would be  
13    treated differently in this type of  
14    interstitial legislation. And a --

15           JUSTICE KAGAN: Ms. -- Ms. Hansford --  
16    I'm sorry. Were you -- I mean, I'm not sure my  
17    question matters at all. In fact, I suspect it  
18    doesn't.

19           But I guess I -- I would like to know,  
20    what do you think Klaxon is? Is it a  
21    constitutional decision? Is it a statutory  
22    decision in the way Justice Barrett suggested?  
23    Or is it, in fact, a federal common law rule?

24           MS. HANSFORD: It -- Klaxon may be a  
25    federal common law rule itself, but I don't

1 think that means that it empowers courts to  
2 create federal common law. I think it does the  
3 opposite.

4 So I -- I think that those two points  
5 come apart, and that may be why it doesn't  
6 ultimately matter to this case even if we're  
7 looking at it in terms of first principles.

8 JUSTICE BREYER: To go back to the  
9 Chief Justice's self-interest, imagine a state,  
10 let's say California or make up a state, call  
11 it Allachusetts or something, and it has a  
12 choice-of-law rule which is under no  
13 circumstances will a court ever give any weight  
14 whatsoever to the rule of Myanmar, okay?  
15 That's their rule.

16 And that might interfere with the  
17 policy that underlies this, and maybe it would  
18 be preempted. I don't know what the ground  
19 would be exactly. It's sort of like there was  
20 a case, you know, out of Massachusetts. But  
21 that could be, I think, the kind of thing that  
22 would raise the question.

23 MS. HANSFORD: Absolutely, Justice  
24 Breyer, and that's exactly where we think those  
25 principles we lay out at pages 21 through 22 of

1     our brief would come in. So how that would be  
2     analyzed is, does that law represent  
3     Massachusetts creating foreign policy in a way  
4     that is preempted either by something specific  
5     or some sort of field preemption? And it would  
6     be very much the Garamendi-Zschernig line of  
7     cases, and it would apply the same way to a  
8     choice-of-law rule.

9             Because this is a choice-of-law rule,  
10    there's also the additional layer that there  
11    would be the due process type of analysis if  
12    that choice-of-law rule was used to apply  
13    Massachusetts law to something that doesn't  
14    have a sufficient connection. So you have that  
15    additional check. But just in the same way  
16    that you would apply that to a substantive rule  
17    down the line in an FSIA case, you would apply  
18    it here.

19            And one other point on that is a lot  
20    of these foreign policy types of considerations  
21    could come up in a case against a private  
22    entity as well. If the foundation were a  
23    private gallery, I think a lot of the same  
24    foreign policy considerations would come up.

25            And so there's really no silver bullet

1 here of creating FSIA-specific choice of law  
2 because the same issues would come up in a case  
3 against a private entity located abroad.

4 JUSTICE ALITO: Would you be less  
5 comfortable with the position you're taking if  
6 at some point in the future the Court were to  
7 say that federal law cannot preempt state law  
8 simply based on federal interests that are not  
9 embodied in a statutory provision that actually  
10 conflict with state law?

11 MS. HANSFORD: I -- I think, if this  
12 Court were to substantially narrow preemption,  
13 I -- I -- I guess that that would be an  
14 argument for reading 1606 a little bit  
15 differently.

16 I think the way the FSIA was drafted  
17 against the background of preemption principles  
18 as they -- as they exist, but I think another  
19 way to think about 1606 in that circumstance  
20 would be as a matter of federal law, specifying  
21 that you're looking to state law principles,  
22 except to the extent that -- that 1606  
23 superimposes a layer on top of that, so I think  
24 there would be that way of going about it.

25 JUSTICE ALITO: Could I ask you the

1 question that I asked Mr. Boies about what  
2 would happen in a situation where a  
3 jurisdiction's choice-of-law rule treats an  
4 instrumentality of a foreign state differently  
5 from a private individual, what -- or a private  
6 entity. What would happen in that situation?

7 MS. HANSFORD: I -- I agree with Mr.  
8 Boies that section 1606 essentially says look  
9 at the law that applies to the private entity  
10 or the private individual and apply that law to  
11 the foreign sovereign.

12 So I think that's the normal operation  
13 of it. I think that's generally how it's  
14 understood in the FTCA context, which has the  
15 same provision that if the law does draw a  
16 distinction between public and private, you  
17 normally -- you look as -- as a general matter.

18 Now I will note that it's possible  
19 that there could be some particular  
20 sensitivity, some extra FSIA principle that  
21 would operate against that in a particular case  
22 if there was really a sensitivity involved, but  
23 I think that is the import of the plain text.

24 JUSTICE ALITO: Well, in light of that  
25 complication, why isn't it simpler to analyze

1     this case just under the Rules of Decision Act?

2             MS. HANSFORD:   You could analyze it  
3     under the Rules of Decision Act, Justice Alito.  
4     I think, because the Rules of Decision Act says  
5     unless law provides otherwise, and we think  
6     that section 1606 does provide otherwise, and  
7     we think that this equal treatment principle is  
8     the preeminent principle here, we think that  
9     that's the most direct way to get there.

10            JUSTICE ALITO:   Well, do you think  
11    there's some problem with analyzing it under  
12    the -- under the Rules of Decision Act?   What  
13    is the problem?   Is the problem the opinion in  
14    Klaxon?   Can't Klaxon easily be understood as  
15    simply based on the Rules of Decision Act?

16            MS. HANSFORD:   I -- I -- I think  
17    the -- the problem is just that by its own  
18    terms, the Rules of Decision Act doesn't seem  
19    to apply when there is an on-point statutory  
20    provision.   And we think that Congress could  
21    alter the provision that --

22            JUSTICE ALITO:   Well, I understand.  
23    But the premise of this is that 1606 may not  
24    come into play until the choice-of-law question  
25    has been decided.

1                   MS. HANSFORD: And -- and -- and I  
2                   would push back on that point, Justice Alito.  
3                   I think that that does not work as a matter of  
4                   statutory text, but I also think the Court has  
5                   already crossed that bridge in the Richards  
6                   decision because it did interpret the identical  
7                   same manner and to the same extent principle as  
8                   applying at the choice-of-law stage and, in  
9                   fact, as the primary reason for incorporating  
10                  state choice-of-law principles so that that  
11                  question that Justice Thomas asked, I do think  
12                  Richards is an answer to that, as well as just  
13                  the textual principle that you can't impose  
14                  liability in the same manner if you're using  
15                  fundamentally different rules.

16                 CHIEF JUSTICE ROBERTS: Justice  
17                 Thomas?

18                 JUSTICE THOMAS: No.

19                 CHIEF JUSTICE ROBERTS: Justice  
20                 Breyer?

21                 Justice Alito?

22                 Justice Sotomayor, anything further?

23                 JUSTICE SOTOMAYOR: No. Thank you.

24                 CHIEF JUSTICE ROBERTS: Justice Kagan?

25                 Justice -- Justice Barrett? No?

1 Thank you, counsel.

2 Mr. Stauber.

3 ORAL ARGUMENT OF THADDEUS J. STAUBER

4 ON BEHALF OF THE RESPONDENT

5 MR. STAUBER: Mr. Chief Justice, and  
6 may it please the Court:

7 Nothing in the Foreign Sovereign  
8 Immunity Act or its foreign affairs origins  
9 mandates that federal courts sitting in  
10 judgment of a foreign state's private or public  
11 acts must employ a forum's choice-of-law test  
12 where the forum has little or no connection to  
13 the claims or the basis for jurisdiction and  
14 the test ignores the federal and foreign  
15 concerns that underpin the FSIA.

16 In the absence of an explicit  
17 statement, Congress did not intend that  
18 California's choice-of-law test should  
19 determine the substantive law to apply to a  
20 foreign state alleged to have committed a wrong  
21 within its own borders. But for Mr. Cassirer's  
22 retirement to San Diego, California would have  
23 no interest in this case.

24 As this Court in Verlinden tells us,  
25 the FSIA arises out of Congress and the



1 executive's shared goals of normalizing  
2 relations among nations during the Cold War and  
3 bringing the U.S. in line with international  
4 law norms, as recognized by this Court in  
5 Phillip v. Hungary -- Germany.

6 To achieve these goals, the FSIA  
7 establishes a federal regime that is intended  
8 to ensure fair and uniform treatment regardless  
9 of where in the United States a foreign state  
10 is held. Because it implicates foreign  
11 relations, the choice-of-law analysis fits  
12 comfortably within a discrete recognized  
13 federal common law enclave, one that does not  
14 intrude into an area of traditional state  
15 interests.

16 Once federal common law determines the  
17 proper substantive law, that law is applied to  
18 the foreign state in the same manner and to the  
19 same extent as a private party under like  
20 circumstances. The foreign state doesn't get  
21 any special treatment in the Court's liability  
22 analysis.

23 Section 1606 relates to the  
24 application of substantive law, not to the  
25 choice-of-law test, the precursor to the

1 liability analysis that determines which  
2 substantive law to apply.

3 Klaxon recognizes that federal courts  
4 exercising diversity jurisdiction must apply  
5 the forum's choice of law, but FSIA cases do  
6 not arise under diversity jurisdiction.

7 Moreover, Klaxon's stated goal of  
8 deterring plaintiffs from shopping for a more  
9 favorable forum by taking their state law  
10 claims across the street to a federal court is  
11 not relevant as Congress wanted FSIA cases to  
12 be litigated in federal courts.

13 I would be happy to address any  
14 questions that the Court may have.

15 JUSTICE THOMAS: Counsel, I don't  
16 quite understand how the sovereign can be  
17 treated in the same manner as a private  
18 individual if you apply different choice-of-law  
19 rules.

20 MR. STAUBER: Well, Your Honor, in the  
21 context of a private party, a private party is  
22 before the court in diversity. A foreign  
23 sovereign is not before the court on diversity  
24 but, as Verlinden tells us, is more before the  
25 court akin to a federal question.

1           Therefore, to put the private party  
2     and the foreign sovereign in a like  
3     circumstance, we actually have to put the  
4     private party in a foreign or more -- more akin  
5     to a foreign question in order to get them into  
6     a like circumstance. And in that case, federal  
7     common law would apply the choice-of-law test,  
8     not a forum states.

9           JUSTICE KAGAN: I guess I don't  
10    understand the premise of your answer. I mean,  
11    you -- you seem to be suggesting that we should  
12    understand this as a federal question case, but  
13    these are not federal question claims. These  
14    are state claims.

15           MR. STAUBER: Correct. The underlying  
16    claim --

17           JUSTICE KAGAN: So why should we think  
18    of it as like a federal question when this --  
19    this suit is not based on federal law?

20           MR. STAUBER: Because this -- but for  
21    the Foreign Sovereign Immunity Act, the foreign  
22    state would not be before the United States  
23    federal courts.

24           The underlying claim may be a  
25    California state claim, it may be in this case

1 a Spanish foreign claim, which is why, as we  
2 were -- the Court was discussing earlier, you  
3 have to always see it through the lens of the  
4 foreign state and the fact and the manner and  
5 the treatment in which it was brought and  
6 hailed before this Court.

7 Only in that context can then you have  
8 a like circumstance where the plaintiff is  
9 likewise not on diversity before the court but  
10 in some question that brought it before the  
11 court addressing a particular concern.

12 JUSTICE KAGAN: That seems to be  
13 treating the foreign state in a way that it's  
14 -- it's really the opposite of the -- of the  
15 way the FSIA instructs in 1606 because what I  
16 take 1606 to essentially be saying is, once  
17 you've decided that the sovereign immunity  
18 doctrines of -- of the FSIA don't apply, the  
19 foreign state really isn't very special.

20 And -- and -- and your answer to  
21 Justice Thomas was essentially to say: Yes,  
22 even once sovereign immunity does not apply,  
23 the foreign state is extremely special and has  
24 to be treated differently.

25 MR. STAUBER: No, the -- the foreign

1 state needs to be treated in a fair and  
2 balanced manner. It does not get extra special  
3 treatment with respect to the liability which  
4 may befall it.

5 As in this case we heard earlier, if,  
6 in fact, Spanish law applies, the private party  
7 in Spain would also under these facts either  
8 have retained the painting or lost the painting  
9 because the substantive law would have applied  
10 to the same.

11 JUSTICE KAGAN: Right. But you're  
12 saying that even though the sovereign immunity  
13 threshold has been met, there is no sovereign  
14 immunity here, still, the foreign state gets  
15 different treatment with respect to choice of  
16 law. And I'm saying, why?

17 MR. STAUBER: No, we're not saying  
18 that the foreign state gets any different  
19 treatment with respect to the choice of law.  
20 We're saying that in order for you to put the  
21 like circumstance together, the private party  
22 would not be before -- the Spanish private  
23 party would not be before the U.S. courts on  
24 diversity grounds because the foreign state is  
25 not here on diversity grounds.

1           Now you're going to have to run a  
2   whole lot of traps to get a private Spanish  
3   party before a U.S. court when the property is  
4   not in the United States, when the act which  
5   caused the wrong or the loss of the property or  
6   the commercial act didn't occur in the United  
7   States. We submit diversity would probably  
8   never work to get the private party here. But,  
9   aside from that, the like circumstance is not  
10  based on diversity.

11           JUSTICE BREYER: Well, so let's follow  
12  through what you say. I see what -- I think I  
13  see it. It says the foreign state, Spain,  
14  shall be liable in the same manner and to the  
15  same extent as a private individual under like  
16  circumstances.

17           MR. STAUBER: Yes.

18           JUSTICE BREYER: Your view is the like  
19  circumstances, you're in a federal court.

20           MR. STAUBER: Yes.

21           JUSTICE BREYER: Okay. Here, they  
22  happen to be suing under California law for --  
23  property law.

24           MR. STAUBER: Yes.

25           JUSTICE BREYER: Conversion, I think.

1 MR. STAUBER: Yes.

2 JUSTICE BREYER: Okay? Fine. Now  
3 let's see. So we pretend that we are in a  
4 federal court suing for conversion. How do we  
5 get into federal court? I mean, it's sort of  
6 interesting. I mean, is it supposed to be an  
7 arising-under case? Do we pretend it's arising  
8 under? Maybe we should pretend it's a -- a  
9 bank conversion case, in which case maybe the  
10 law of the Vatican applies. I don't know.

11 I mean, how do we do this? It sounds  
12 a little complicated, your view. At least the  
13 opposite view is simple. You say what it was.  
14 It was a -- it's a state claim. State claims  
15 belong here in -- under these circumstances,  
16 under diversity jurisdiction, and so we apply  
17 California law. Okay?

18 But what is your view? We don't even  
19 know what the claim is supposed to be.

20 MR. STAUBER: Your Honor, we would --  
21 your -- Justice, we would submit that our view  
22 is actually the simpler view because, if you  
23 have a uniform federal common law choice test  
24 that will apply in all of the federal circuits  
25 and therefore apply in all of the 50 states,

1     then you will not end up with a disparity of  
2     treatment for a foreign state regardless of  
3     where it appears.

4             JUSTICE BREYER:   Okay.   My only  
5     problem with that is I can't think of any  
6     private individual who would be treated that  
7     way.

8             MR. STAUBER:   Yes, Your Honor.   You  
9     would be treated -- Justice, you would be  
10    treated differently on your choice-of-law test  
11    in particular on a state forum with bias  
12    towards the private party if you were in  
13    Kentucky or if you were in Michigan.

14            And at the present time, the  
15    choice-of-law test by forums, the majority use  
16    the Restatement, which is used by the federal  
17    common law approach.   And we can never forget  
18    that the underpinning reason for the Foreign  
19    Sovereign Immunity Act was to take both the  
20    executive branch and the courts out of the ad  
21    hoc basis of disparate treatment of foreign  
22    sovereigns on a case-by-case basis.

23            So our approach actually brings  
24    predictability, uniformity, and prevents the  
25    hostile outcomes, which we submit you do not



1 actually have a resolution for because, as this  
2 Court, most recently in Philipp v. Germany and  
3 in Simon v. Hungary, passed on the question if  
4 international comity is an available  
5 affirmative defense. And, in fact, as the  
6 Turkish government recently learned in the  
7 Washington, D.C., courts, international comity  
8 was not available to it.

9 This case, we would submit, is a test  
10 case for you in the study that after-the-fact  
11 stepping in by the United States or by the --  
12 or by the courts later in a case to remedy what  
13 could be a constitutional violation or an  
14 overreach of a state in its territorial  
15 interests does not work.

16 This case was originally filed in  
17 2005. We didn't get to the choice-of-law  
18 question until 2015. So --

19 JUSTICE ALITO: If --

20 MR. STAUBER: -- the foreign state has  
21 been in litigation for 10 years, no longer has  
22 international comity available to it. And  
23 foreign states do not enjoy, as a private party  
24 does, the benefit of due process.

25 JUSTICE ALITO: If this is to be

1     decided under federal law, federal common law,  
2     who is going to decide that and on what basis?

3             MR. STAUBER:   If this is to be decided  
4     under federal common law choice of law?

5             JUSTICE ALITO:   Yeah, federal common  
6     law choice of law.

7             MR. STAUBER:   It -- it will be, as  
8     happened here, the district court, which had  
9     jurisdiction under the Foreign Sovereign  
10    Immunities Act and applying it as it did.

11            JUSTICE ALITO:   No, I mean, what is  
12    going to be the substance of this federal  
13    common law choice-of-law principle?

14            MR. STAUBER:   What is going to be the  
15    substance?

16            JUSTICE ALITO:   Where are we going to  
17    find it?

18            MR. STAUBER:   Ah.   We will find it  
19    where we now find it.   We find it in the  
20    Restatement.

21            JUSTICE ALITO:   Why?

22            MR. STAUBER:   Because that is where  
23    the federal courts have decided to look.

24            JUSTICE ALITO:   Why?

25            MR. STAUBER:   Because those are the

1 principles which take into consideration the  
2 international relations which underpin the  
3 Foreign Sovereign Immunity Act. As we --

4 JUSTICE ALITO: Well, what if -- I  
5 mean, what if the -- the Ninth Circuit says  
6 we're going to look at the -- at the Second  
7 Restatement, and another circuit says we're  
8 going to look at the First Restatement, and  
9 another circuit says we don't like either of  
10 those, we're going to develop our own  
11 choice-of-law rules? Would we have to decide  
12 what the choice-of-law rule was?

13 MR. STAUBER: I think that is where  
14 this Court is very well positioned to set forth  
15 uniform choice-of-law rules under federal  
16 common law --

17 JUSTICE ALITO: Well, why are we in --

18 MR. STAUBER: -- and the Foreign  
19 Sovereign --

20 JUSTICE ALITO: -- a position to do  
21 that? That involves very -- it involves  
22 serious policy questions, doesn't it?

23 MR. STAUBER: It involves, I think, a  
24 very straightforward application, as this Court  
25 did most recently in Philipp v. Germany, where

1     it looked to the guiding international norms,  
2     it looked to the conflicts of law, it looked to  
3     the Restatement to define the definition of a  
4     violation of international law.

5             That is something that this Court is  
6     -- is well positioned to do, to provide the  
7     guidance to all the federal circuits as to the  
8     application and use of the federal common law  
9     choice-of-law test.

10            CHIEF JUSTICE ROBERTS:  It seems to me  
11     that you're seeking the benefit of the fact  
12     that your -- or your client is, that it is a  
13     foreign sovereign, sort of at every different  
14     stage of the analysis, before you can get  
15     hailed -- haled into court and how you can be  
16     treated at different stages.

17            And it seems to me that at some point,  
18     1606 sort of says, okay, you've gotten the  
19     advantage of being a foreign sovereign in our  
20     treatment in -- in -- in our courts, but no  
21     more.  Now that you've gotten down to this  
22     level, we're going to treat you like a private  
23     party.

24            MR. STAUBER:  Right.

25            CHIEF JUSTICE ROBERTS:  And that

1     should extend to choice-of-law issues at that  
2     point as at -- as any other.

3             MR. STAUBER:   We would submit that it  
4     doesn't trigger until actually you get to the  
5     substantive law, which is the choice of law.  
6     Not -- I'm sorry, not the choice of law, but,  
7     actually, the substantive law that applies.

8             The choice of law and the substantive  
9     applicable law are not necessarily one and the  
10    same.  They may be --

11            CHIEF JUSTICE ROBERTS:  Sure.

12            MR. STAUBER:  -- in Klaxon.  They may  
13    be in diversity.  But that is not for which we  
14    do sit.  And, therefore, the overarching policy  
15    that drove the Foreign Sovereign Immunity Act  
16    in 1976 was -- was, in fact, that a foreign  
17    state -- we're not asking for special  
18    treatment.  We're not asking for different  
19    treatment.  Once we're before the courts, we're  
20    asking for fair and balanced treatment, but  
21    always acknowledging the fact that we are a  
22    foreign state.  And we never leave --

23            JUSTICE KAGAN:  And where do you get  
24    that --

25            MR. STAUBER:  -- that distinction

1 behind.

2 JUSTICE KAGAN: -- where do you get  
3 that from? Where do you draw the line? And  
4 you say, well, 1606 doesn't kick in until after  
5 the choice-of-law question. Where do you get  
6 that from? Is it from the words of 1606? Is  
7 it from some idea of legislative history? Is  
8 it from some idea of good foreign relations  
9 policy? Where is it coming from?

10 MS. STAUBER: I would say, Your  
11 Honor -- Justice, it's coming from all of  
12 those. First of all, the Foreign Sovereign  
13 Immunity Act, when Congress drafted it in its  
14 legislative history, it speaks ultimately in  
15 its adoption not to Klaxon. It, in fact,  
16 removes the foreign sovereign from diversity.  
17 It could have simply added to 1332 and included  
18 these types of claims. It did not. It -- it  
19 created 1330, which is not based on diversity.

20 I would submit it's in the language  
21 itself. The language does not state that you  
22 use a state forum's choice-of-law test. It  
23 simply states that you treat the -- the private  
24 party and the foreign state as to its liability  
25 in saying --

1 JUSTICE KAGAN: Right, but you're not  
2 going to be liable in the same manner and to  
3 the same extent as a private individual if two  
4 different sets of law are used.

5 MR. STAUBER: That's correct, Your  
6 Honor, but they're not going to be treated as  
7 -- in the same manner and the same as a private  
8 party if they're now shifted over to a  
9 diversity setting, which wasn't the basis of  
10 jurisdiction in the first place.

11 The Rules of Decision came up as a --  
12 as a question that was in the -- in the Court's  
13 interest, and I want to point out that the  
14 Rules of Decision does not actually apply here  
15 because, under the Rules of Decision, they're  
16 based on diversity. We are not sitting here in  
17 diversity. The Rules of Decision were passed  
18 in 1908. They -- they precede the Foreign  
19 Sovereign Immunity Act of 1970 -- 1976.

20 I also want to point out that the  
21 Foreign Sovereign Immunity Act, as this Court  
22 in Verlinden tells us, applies to both U.S.  
23 citizens and non-U.S. citizens. In that  
24 scenario, as we know from the Holy See case in  
25 the Sixth Circuit, you may have a situation

1     where you have a class action. And class  
2     actions are starting to arise in this  
3     expropriation context. And in a class action,  
4     in this -- from this Court in Schutt, we know  
5     that each individual plaintiff is subject to a  
6     separate choice-of-law test.

7             So what will happen here in this  
8     scenario is you would have in -- in any one of  
9     cases that are coming up in which a plaintiff  
10    is a foreign citizen that this Court takes  
11    jurisdiction under the Foreign Sovereign  
12    Immunity Act, you would have a state's  
13    choice-of-law test applying to decide what the  
14    substantive law is to, for example, a Spanish  
15    citizen who's filed a case against the Kingdom  
16    of Spain. Or, in the case that is proceeding  
17    now before the District Court of Columbia in  
18    Simon v. Hungary, you would have a Hungarian  
19    citizen who is a member of the class, and their  
20    choice-of-law test would be based on D.C. as to  
21    their case against the Hungarian state.

22            We submit, Your Honors, that the  
23    foreign relations concerns that drove the  
24    creation of the Foreign Sovereign Immunity Act  
25    are the same foreign relations concerns that



1 continue to drive its application today. And  
 2 the use of a state law forum choice of test is  
 3 not called for, required or mandated by  
 4 Congress or by the statute.

5 CHIEF JUSTICE ROBERTS: Can't the  
 6 various considerations that you've been talking  
 7 about be applied fully at the liability stage?  
 8 Why -- why is it necessary that -- is it -- is  
 9 it the only way you can protect the foreign  
 10 interests if the federal government, for  
 11 example, has that interest is at the choice of  
 12 law stage? Can't you -- can't those be taken  
 13 into account when you get to the substantive  
 14 law?

15 MR. STAUBER: They --

16 CHIEF JUSTICE ROBERTS: I mean, if  
 17 there's some problem with the state choice of  
 18 law because the choice they've chosen is one  
 19 that prejudices foreign sovereigns in a way  
 20 that's contrary, as our federal government  
 21 would say, to the national interest, why can't  
 22 you take that into account at that point?

23 MR. STAUBER: You can take it into --

24 CHIEF JUSTICE ROBERTS: Just a  
 25 starting point, in other words.

1           MR. STAUBER: You -- you can take it  
2     into account. We're not saying you can't take  
3     it into account, but we're saying that you need  
4     to, in order to provide predictability and  
5     uniformity, which is one of the tenets of the  
6     Foreign Sovereign Immunity Act for the foreign,  
7     they need to know once they're hailed into the  
8     U.S. court whether they're hailed in in  
9     Arizona, in Iowa, in Michigan or Kentucky, that  
10    they're going to be treated fairly and they're  
11    going to be treated the same.

12           To find that out 10, 12, 15 years  
13    later after the litigation has been going on  
14    undercuts the very policies of the Foreign  
15    Sovereign Immunity Act.

16           CHIEF JUSTICE ROBERTS: Well, I think  
17    it's pretty fair at that stage to tell them  
18    you're going to be treated the same as a  
19    private party when it comes to the question of  
20    choice of law. Now maybe you've a special  
21    argument about your -- based on your foreign  
22    status, and you can raise that when you get to  
23    the point and say, okay, choice of law is this,  
24    and you say well here's why it doesn't protect  
25    our interests, and maybe you get Ms. Hansford's

1 client to come in and agree with it, I just  
2 don't know why that has to take place at the  
3 choice of law stage.

4 MR. STAUBER: Because you -- you would  
5 end up with a different outcome, disparate  
6 treatment to the foreign state, if it was  
7 hailed into a different state.

8 If this case had proceeded in New York  
9 where Mr. Cassirer first moved to when he came  
10 to the United States, we would have a different  
11 outcome. If this case proceeded in Ohio when  
12 he moved there in the 1950s, we would have a  
13 different outcome.

14 But for the fact that Mr. Cassirer  
15 chose to retire to California, we now have a --  
16 a third different outcome. That is not  
17 consistent with the concerns that were  
18 addressed, need to be addressed under the  
19 Foreign Sovereign Immunity Act and we would  
20 submit --

21 CHIEF JUSTICE ROBERTS: Well, you know  
22 --

23 MR. STAUBER: -- one line of 1606 --

24 CHIEF JUSTICE ROBERTS: -- welcome --  
25 welcome to the United States. That's how the

1 courts work. And a private citizen of the  
2 United States moves from New York to Ohio, the  
3 law that applies to him is going to change as  
4 well.

5 And we're dealing with a law that says  
6 you apply this -- the law to -- to -- to the  
7 foreign sovereign as if a private party. And  
8 the alternative is what we have said is an  
9 unusual situation where you're asking the  
10 courts to devise their own body of law that's  
11 going to apply in this situation.

12 MR. STAUBER: We don't think we're  
13 asking the Court to devise its own body of law.  
14 We think we're simply asking the court -- the  
15 federal court which is sitting within a unique  
16 enclave of foreign affairs where it is  
17 precisely, strong and well-reasoned to sit in  
18 to -- to create a uniform application choice of  
19 law test to apply to any foreign state.

20 JUSTICE GORSUCH: Counsel, you -- you  
21 suggest that if -- if you should lose on -- on  
22 the choice of law question, that there are, in  
23 fact, constitutional constraints in this case  
24 that would prohibit the application of  
25 California law.

1           Your friends on the other side say  
2       those arguments have been waived, this  
3       litigation has been going on long enough, and  
4       we shouldn't take those up or allow those to be  
5       presented on remand.

6           Wanted to give you an opportunity to  
7       respond.

8           MR. STAUBER: I appreciate that, Your  
9       Honor.

10          We do not think those -- those  
11       questions have been -- been waived at all, Your  
12       Honor. As we articulated earlier, due process  
13       is a question that is always at play.

14          The question of --

15          JUSTICE GORSUCH: Well, due process is  
16       always in play until you fail to raise the  
17       argument --

18          MR. STAUBER: Well, we did raise the  
19       argument.

20          JUSTICE GORSUCH: -- then it usually  
21       isn't in play. So was it in play? Was it  
22       preserved below? What have -- what have you  
23       got for me on that?

24          MR. STAUBER: Sure, we would submit it  
25       was -- it was preserved below. We have

1 consistently argued and presented to the Court  
2 the due process concerns about the application  
3 of a California statute which would divest the  
4 foreign sovereign's agency or instrumentality  
5 of the property right which was already vested  
6 at the time this case was brought if you end up  
7 applying California law.

8 And it's not until that application of  
9 foreign -- of California law comes into place  
10 that you have the constitutional due process  
11 violation that needs to be raised.

12 JUSTICE GORSUCH: How long has this  
13 case been going on and -- and --

14 MR. STAUBER: This case, Your Honor,  
15 started in 2005. And it has been going on now  
16 for 15 years, which is why we submit it is  
17 precisely a case that is ripe for this Court to  
18 affirm the Ninth Circuit's application of  
19 the -- in this particular case, the federal  
20 common law choice and, in particular, since it  
21 landed both under the California choice of law  
22 test and under the federal common law choice of  
23 law test, at the same result, we do think in  
24 either way, this Court can affirm the -- the  
25 Ninth Circuit's decision.

1 JUSTICE GORSUCH: I guess I'm just  
2 wondering if -- if -- if I were to think that  
3 the -- Chief Justice's line of questioning has  
4 some force and that the state law should be the  
5 default but there might be some constitutional  
6 backstop arguments and if I have serious doubts  
7 about whether those constitutional backstop  
8 arguments have -- have been presented, whether  
9 it might be time to call this one to a close.

10 MR. STAUBER: Call which one, the case  
11 itself to a close?

12 JUSTICE GORSUCH: The case. Yeah.  
13 Fifteen years, 16, whatever, 17 years it's  
14 been? On choice of law, we haven't gotten past  
15 choice of law? Oh, no --

16 MR. STAUBER: We did -- we did get  
17 past choice of law in 2015 with the -- with the  
18 motion for summary judgement when the choice of  
19 law was decided and we did a full trial on the  
20 merits. And based on a full trial on the  
21 merits, the Court determined that the --

22 JUSTICE GORSUCH: I appreciate that  
23 but here we are back at the starting gate,  
24 potentially. Right? I mean --

25 MR. STAUBER: Well --

1 JUSTICE GORSUCH: -- we would have  
2 this case start all over again in some ways.

3 MR. STAUBER: In some ways we -- we  
4 would, which is why we think this is not a  
5 case -- because it would have gone both to the  
6 Thyssen-Bornemisza under California choice of  
7 law and under federal common law choice of law  
8 but the trial court, which did examine the  
9 issue, and whose factual findings are due  
10 deference, did find that Spanish law should  
11 apply to the ultimate outcome.

12 So I would share this Court's concern  
13 that, yes, I think you bring this case to a  
14 close, either under the California choice of  
15 law test or the federal common law choice of  
16 law test, but I do think it is time to bring  
17 the case to a close.

18 JUSTICE ALITO: Well, this is not the  
19 issue before us, but what -- can you -- can you  
20 state in a simple -- in simple terms what is  
21 the arguably relevant difference between  
22 California -- the California's choice of law  
23 rule and the restatement?

24 MR. STAUBER: Yes. California's  
25 choice of law rule test does not take into



1     consideration the very federal and  
2     international concerns which are taken into  
3     consideration under the federal common law.

4             In other words, in this particular  
5     case, California's choice of law test does not  
6     take into consideration the Terezin Declaration  
7     or the Washington Principles or the Holocaust  
8     Era Art Restitution Act of 2016.

9             It does not take into consideration  
10    those national policies which formulate the  
11    United States' position that these -- these  
12    cases should be brought to a fair and just  
13    resolution through some sort of negotiation or  
14    alternative resolution in respect for the laws  
15    of all states, not just the United States.

16            And by forcing a federal court to use  
17    the state law choice, you are in effect  
18    handcuffing that federal court judge who is  
19    attempting to administer their case in a fair  
20    and balanced way to take into consideration  
21    these competing interests which are at play in  
22    extraordinary expropriation cases.

23            JUSTICE BREYER:  So you agree then --  
24    you -- you agree then that the district court  
25    was wrong, you agree with your opposing counsel

1     that the district court, in saying that  
2     California would choose Spanish law, you both  
3     think he's wrong?

4             MR. STAUBER:  No.  I think the  
5     district court was right in its --

6             JUSTICE BREYER:  When it comes the  
7     same law, Spanish law, what are all these  
8     differences you're talking about?

9             MR. STAUBER:  No.  The -- what I am  
10    saying that in applying the California choice  
11    of law test, the district court applied it  
12    correctly and landed at the result that under  
13    the California choice of law test, Spanish law  
14    applies.

15            It also applied at the federal  
16    approach correctly and landed at Spanish law.  
17    What I'm saying is that by man- -- by this  
18    Court mandating or allowing it to be proceed in  
19    50 different states under 50 different choice  
20    of law tests, you will be telling a federal  
21    court judge, 700 different federal court judges  
22    that when cases involving the expropriation  
23    exception, cases which by definition include  
24    international concerns in our relations among  
25    nations, that you are forced to use that forum

1 choice law test which may not, in particular,  
2 in Kentucky, in Michigan or in any one of the  
3 states that doesn't currently use the  
4 restatement, you may not take those federal  
5 international concerns into consideration.

6 JUSTICE SOTOMAYOR: Counsel, I'm going  
7 -- I'm too much a practical person for this  
8 argument that you're raising. If California  
9 law and federal law, you say, both correctly  
10 point to the application of Spanish law, what  
11 are you afraid of?

12 MR. STAUBER: I'm not --

13 JUSTICE SOTOMAYOR: The -- you're  
14 afraid of something. You're afraid that  
15 they're right, that some aspect of California  
16 law can hurt you, correct?

17 MR. STAUBER: No, Your Honor, I -- I  
18 would beg to differ with that. And if I've  
19 given that impression, I am not doing my job as  
20 an advocate. We welcome an analysis, if that's  
21 what this Court so thinks is necessary, under  
22 the California choice-of-law test because, as  
23 we said earlier, the district court did it  
24 correctly with respect to its factual deference  
25 and its application of law. So --

1 JUSTICE SOTOMAYOR: Now, I understood  
2 from the briefing by everyone that, in most  
3 circumstances, federal and state choice-of-law  
4 provisions would come out the same way. Am I  
5 correct on that assumption?

6 MR. STAUBER: In this particular  
7 circumstance, it would. In 27 states which use  
8 the Restatement, we -- we -- we think it would.

9 But the problem is that in this -- we  
10 -- when you take this case and you bring this  
11 case forward, it speaks to the -- the entire  
12 federal circuit. And our concern being  
13 expressed here is not for our particular case  
14 at hand, but the implications for foreign  
15 sovereigns who are haled into jurisdictions  
16 which don't use the Restatement, may choose to  
17 use a -- a state law choice-of-law test that is  
18 biased.

19 JUSTICE SOTOMAYOR: And that may raise  
20 constitutional claims as the Petitioner and the  
21 SG stated, correct?

22 MR. STAUBER: It raises constitutional  
23 claims. It raises international comity claims.

24 JUSTICE SOTOMAYOR: But you're not  
25 claiming any of those are raised here?

1           MR. STAUBER: At the present time, it  
2 would be -- if the court decided, that is the  
3 Ninth Circuit decided, to apply California's  
4 choice-of-law test in a way that applied  
5 California law, we would submit that would be a  
6 constitutional violation. It would be an  
7 extraterritorial reach of California state law,  
8 which California state has no interest in this  
9 case but for an individual, in this case a U.S.  
10 citizen, but in another case, it could be a  
11 non-U.S. citizen who chooses to move to Alabama  
12 or Florida or anywhere else for that matter.

13           JUSTICE SOTOMAYOR: And what would  
14 preclude you from raising that argument?

15           MR. STAUBER: We don't think anything  
16 would preclude us, Your Honor.

17           JUSTICE SOTOMAYOR: All right. Thank  
18 you, counsel.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Thomas?

21           Justice Breyer?

22           JUSTICE BREYER: Can everyone agree  
23 that this is a beautiful painting?

24           MR. STAUBER: Yes, it is, Your Honor.  
25 It's a very, very beautiful painting. And we

1 take, with all due grace and respect, this  
2 Court's attention to this particular case. And  
3 that is why we are not advocating necessarily  
4 for one outcome or the other. We are  
5 advocating for are a fair and balanced  
6 treatment of the foreign state in this  
7 particular circumstance and when it comes to  
8 the application of a choice-of-law test under  
9 the Foreign Sovereign Immunity Act.

10 CHIEF JUSTICE ROBERTS: Justice Alito?  
11 Anything further, Justice Sotomayor?

12 JUSTICE SOTOMAYOR: No. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?  
14 Justice Gorsuch?

15 Justice Barrett?

16 Thank you, counsel.

17 MR. STAUBER: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Boies, do  
19 you have rebuttal?

20 REBUTTAL ARGUMENT OF DAVID BOIES  
21 ON BEHALF OF THE PETITIONER

22 MR. BOIES: Yes, thank you, Mr. Chief  
23 Justice.

24 First, let me just clarify, we  
25 disagree that the Rules of Decision Act only

1 applies to diversity cases. On page 13 of our  
2 reply brief, we indicate some authority to the  
3 contrary.

4           The basic point I want to make is that  
5 Respondent cites no case and we are aware of  
6 none where this Court has separated state  
7 choice of law from state rule of decision.  
8 Whether it is viewed under the Rule of Decision  
9 Act, whether it's viewed under the Klaxon  
10 decision, this Court has repeatedly declined to  
11 separate state choice of law from state rule of  
12 decision where state causes of action were  
13 involved.

14           In this particular case, Congress has  
15 been clear in Section -- Section 1606 that the  
16 state actors should be liable in the same  
17 manner to the same extent as the private party  
18 under like circumstances.

19           There's no way, I respectfully  
20 suggest, that you can read that language and  
21 say that you can have different choice-of-law  
22 rules apply when a state actor is involved than  
23 when a private museum 's involved. A private  
24 museum could face exactly the same lawsuit as  
25 this public museum could face based on exactly

1 the same painting and exactly the same  
2 circumstances.

3 And the command of 1606 is that that  
4 ought to be -- the same rule ought to be  
5 applied. Whether it is a good rule or a bad  
6 rule is not -- is for Congress to decide. The  
7 arguments Respondent make -- and they're  
8 fundamentally arguments that 1606 should've  
9 been drafted differently. We think it was  
10 drafted the right way, but whether it's right  
11 or wrong, that is the way Congress adopted it.

12 We've also -- and I said this at the  
13 beginning. We've had 20 years of experience,  
14 including in the Sixth Circuit, which is the  
15 circuit with Michigan and Kentucky that  
16 Respondent's counsel mentions, where the court  
17 has interpreted 1606 consistent with its  
18 language and applied state choice-of-law rules.  
19 We haven't had any problems in those states --  
20 those situations.

21 So the issues we think, from a policy  
22 standpoint, are -- are just speculation that  
23 are not consistent with what the historical  
24 experience has been.

25 But whether or not it is a good idea



1     or a bad idea, we think 1606 is -- is -- is  
2     clear on its face.

3                 CHIEF JUSTICE ROBERTS:  Thank you,  
4     counsel.

5                 The case is submitted.

6                 (Whereupon, at 12:29 p.m., the case  
7     was submitted.)

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